

1 OGONNA M. BROWN, ESQ.  
2 Nevada Bar No. 7589  
3 E-mail: [obrown@nevadafirm.com](mailto:obrown@nevadafirm.com)  
ANDREA M. GANDARA, ESQ.  
3 Nevada Bar No. 12580  
4 E-mail: [agandara@nevadafirm.com](mailto:agandara@nevadafirm.com)  
HOLLEY DRIGGS, WALCH  
FINE WRAY PUZEY & THOMPSON  
5 400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
6 Telephone: 702/791-0308

7 *Attorneys for Steven Joe, Michael McNeill and Juliana McNeill*

8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF NEVADA**

10 SALMA AGHA-KHAN, MD., an individual  
11 Plaintiff,  
12 v.  
13 PACIFIC COMMUNITY MORTGAGE  
INC.; et al.,  
14 Defendants.  
15

Case Number  
2:16-cv-01124-JCM-NJK

**DEFENDANTS STEVEN JOE,  
MICHAEL MCNEILL, AND JULIANA  
MCNEILL'S MOTION TO DISMISS**

16 Defendants STEVEN JOE (“S. Joe”), MICHAEL MCNEILL (“M. McNeill”) and  
17 JULIANA MCNEILL (“J. McNeill”) (collectively, the “Moving Defendants”), by and  
18 through their attorneys of record, Ogonna M. Brown, Esq. and Andrea M. Gandara, Esq., of  
19 the law firm Holley Driggs Walch Fine Wray Puzey & Thompson, and pursuant to Rule 9(b)  
20 and Rule 12(b)(6) of the Federal Rules of Civil Procedure, hereby move to dismiss Count VII  
21 (Third Cause of Action for Injunctive Relief for Unjust Enrichment), Count VIII (Fourth  
22 Cause of Action for Breach of Contract), Count V (Violation of Nevada Rev. Statutes 645 et  
23 seq. and 675 et seq.), and Count XIII (Ninth Cause of Action for Negligence), for failure to  
24 state a claim upon which relief can be granted. Plaintiff’s claims against Moving Defendants  
25 relate to the September 2010 foreclosure sale and the purchase of the real property located at  
26 1967 Cherry Creek Circle, Las Vegas, Nevada 89135 (“Property”) by S. Joe and M. McNeill.  
27

Moving Defendants' Motion to Dismiss (the "Motion") is made and based upon the following Memorandum of Points and Authorities, the pleadings and papers on file herein and any argument presented at hearing on the Motion.

4 DATED this 10th day of June, 2016.

# HOLLEY DRIGGS WALCH FINE WRAY PUZEY & THOMPSON

/s/ Ogonna M. Brown

OGONNA M. BROWN, ESQ.

Nevada Bar No. 7589  
E-mail: [jeffrey.schiff@schiff.com](mailto:jeffrey.schiff@schiff.com)

E-mail: obrown@nevadafirm.com

ANDREA M. GANDA  
Newark Bay NJ 12580

Nevada Bar No. 12580  
Email: agandara@nevadafirm.com

Email: agaldara@nevadahm.com  
400 South Fourth Street, Third Flr.

400 South Fourth Street  
Las Vegas Nevada 89101

Telephone: 702/791-0308

*Attorneys for Defendants S*

*Michael McNeill and Juliana McNeill*

## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

15 On May 19, 2016, Plaintiff Salma Agha-Khan, MD (“Plaintiff”) filed a Complaint in  
16 the United States District Court, District of Nevada, alleging twelve (12) separate causes of  
17 action arising from Plaintiff’s financing procured on the Property, and Plaintiff’s default,  
18 resulting in the subsequent foreclosure and sale of said Property. Quality Loan Service Corp.  
19 (“Quality Loan”), as nominee for Pacific Community Mortgage Inc. (“Lender”), recorded a  
20 Notice of Trustee’s Sale on May 14, 2010, scheduling the foreclosure sale for June 1, 2010.  
21 The foreclosure sale ultimately occurred on September 2, 2010, for the winning bid of  
22 \$594,891.05, sold to S. Joe and M. McNeill, each holding a fifty-percent (50%) ownership  
23 interest in the Property. S. Joe and M. McNeill addressed the tax liens encumbering the  
24 Property. Over six (6) months after acquiring the Property, on February 24, 2011, S. Joe and  
25 M. McNeill sold the Property to a bona fide third-party purchaser. Immediately before this  
26 sale, M. McNeill’s wife executed a Grant, Bargain and Sale Deed, which was recorded on  
27 February 24, 2011, for the sole purpose of relinquishing any of her community property

1 rights or claims as to the Property. J. McNeill had absolutely no involvement in the  
2 transaction with Plaintiff, and should be dismissed as a party from this litigation  
3 immediately.

4       Nearly six (6) years after S. Joe and M. McNeill sold the Property to a third party,  
5 Plaintiff commenced the above-captioned litigation against S. Joe and M. McNeill, and his  
6 wife J. McNeill, among a litany of other defendants, resulting in a total of thirty-one (31)  
7 defendants. See Complaint (“Compl.”) [ECF No. 1]. As explained below, Plaintiff’s claims  
8 for Injunctive Relief for Unjust Enrichment, Breach of Contract, violation of NRS Chapters  
9 645 and 675, and Negligence alleged against the Moving Defendants each fail as a matter of  
10 law.

11 Plaintiff's claims for Injunctive Relief for Unjust Enrichment, Breach of Contract,  
12 violation of NRS Chapters 645 and 675, and Negligence fails as a matter of law and must be  
13 dismissed under Rule 12(b)(6), based upon the deficient allegations set forth in the  
14 Complaint, including the claims based in fraud that require the heightened pleading under  
15 Rule 9(b). Based on the foregoing, Moving Defendants respectfully request that this Court  
16 dismiss Plaintiff's claims for Injunctive Relief for Unjust Enrichment, Breach of Contract,  
17 violation of NRS Chapters 645 and 675, and Negligence.

## **II. FACTS**

19       1. Plaintiff obtained a loan from Lender in the amount of \$615,000.00 (“Loan”),  
20 which Loan was secured by a Deed of Trust dated August 18, 2004, in favor of Lender. The  
21 Deed of Trust was recorded with the Clark County Recorder’s Office on September 8, 2004.  
22 See Compl. Exhibit B [ECF No. 1, p. 63 of 95].

23       2. Plaintiff defaulted under the Loan by, among other things, failing to make the  
24 installment payments of principal and interest which became due on October 1, 2009, along  
25 with all subsequent installments. As a result of Plaintiff's default under the Loan, on January  
26 13, 2010, Lender caused to be recorded the Notice of Breach and Default and of Election to  
27 Cause Sale of Real Property Under Deed of Trust ("Notice of Breach and Election to Sell")

1 against the real property located at 1967 Cherry Creek Circle, Las Vegas, Nevada 89135,  
2 Assessor's Parcel Number 164-02-218-001 ("Property"). See Notice of Breach and Election  
3 to Sell, Exhibit C of Compl. [ECF No. 1, p. 72 of 95].

4       3. On February 5, 2010, Quality Loan was substituted for Mortgage Electronic  
5 Registration Systems as the Lender's nominee and new Trustee for the Lender. See  
6 Substitution of Trustee, Exhibit D of Compl. [ECF No. 1, p. 76 of 95].

7       4. On May 14, 2010, Quality Loan, as nominee for the Lender, recorded a Notice  
8 of Trustee's Sale, scheduling the foreclosure sale for June 1, 2010, at 10:00 a.m. See Notice  
9 of Trustee's Sale, Exhibit G of Compl. [ECF No. 1, p. 84 of 95].

10       5. The foreclosure sale ultimately occurred on September 2, 2010, for the  
11 winning bid of \$594,891.05, sold to S. Joe and M. McNeill, each holding a fifty-percent  
12 (50%) ownership interest in the Property. See Trustee's Deed Upon Sale, Exhibit H of  
13 Compl. [ECF No. 1, p. 87 of 95].

14       6. On February 24, 2011, the Grant, Bargain and Sale Deed executed by J.  
15 McNeill, the wife of M. McNeill, was recorded as to the Property to relinquish any rights or  
16 claims to the Property as part of their community property. The Grant, Bargain and Sale  
17 Deed expressly provides that J. McNeill:

18           ...does hereby GRANT, BARGAIN, SELL and CONVEY to

19           **Michael McNeill, A Married Man as His Sole and Separate Property.**

20       See Grant, Bargain and Sale Deed, **Exhibit 1** to the Request for Judicial Notice.

21       7. Over six (6) months after acquiring the Property at the foreclosure sale, S. Joe  
22 and M. McNeill sold the Property to a bona fide third-party purchaser on February 24, 2011.<sup>1</sup>  
23

24

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25       <sup>1</sup> In the Request for Judicial Notice, Moving Defendants respectfully request that the Court take judicial notice  
26 of the Grant, Bargain and Sale Deed from J. McNeill to M. McNeill, recorded in the Clark County Recorder's  
27 Office as Document No. 201102240003424 on February 24, 2011, and the Grant, Bargain and Sale Deed from  
S. Joe and M. McNeill to third party buyers, recorded as Document No. 201102240003425 on February 24,  
2011, attached as **Exhibit 1** and **Exhibit 2**, respectively, to the Request for Judicial Notice filed  
contemporaneously herewith.

1 See Grant, Bargain and Sale Deed from S. Joe and M. McNeill to third-party buyers,  
2 **Exhibit 2** to the Request for Judicial Notice.

3       8. On May 19, 2016, Plaintiff Salma Agha-Khan commenced the above-  
4 captioned litigation against Moving Defendants, *inter alia*, alleging Injunctive Relief for  
5 Unjust Enrichment, Breach of Contract, violation of NRS Chapters 645 and 675 and  
6 Negligence against Moving Defendants.

7       9. In the Complaint, Plaintiff alleges that S. Joe, M. McNeill, and J. McNeill  
8 were “involved in fraudulent property transactions.” (Compl., p. 5, ¶¶ 18-19, ll. 21-25, p. 6,  
9 ¶ 21, ll. 4-6.)

10      10. The next allegation in the Complaint that makes any reference to Moving  
11 Defendants appears on page 14, where Plaintiff further alleges that “purchasers” S. Joe, M.  
12 McNeill, and J. McNeill were “sophisticated ‘investors’, and knew at the time of purchase  
13 that there was no valid chain of title under which they could purchase this Property for any  
14 legal reason whatsoever which is why they ‘flipped’ the property within months of acquiring  
15 it.” (Compl., p. 14, ¶ 65, ll. 4-8.)

16      11. Plaintiff makes a general allegation that may relate to Moving Defendants,  
17 although it is unclear, alleging that “there is no chain of title for any Defendant herein to  
18 enforce any foreclosure or subsequent sale.” (Compl., p. 30, ¶ 124, ll. 1-2.)

19      12. Plaintiff’s first allegation under the Causes of Action asserted against any of  
20 the Moving Defendants appears on page 43 of the Complaint, where Plaintiff alleges that  
21 “Defendant McNeill and Joe are not and were not bonafide [sic] purchasers for value. A mere  
22 investigation of title would dispose anyone of any legality of this purchase and any purchaser  
23 should have reasonable cause to investigate the Non-Judicial Trustee’s Sale.” (Compl., p. 43,  
24 ¶ 184, ll. 12-15.)

25      13. Even though Plaintiff states that the Ninth Cause of Action for Negligence is  
26 against all Defendants, the Ninth Cause of Action is devoid of a single reference to any of the  
27 Moving Defendants. (Compl., p. 48, ¶ 211, ll. 23-25, pp. 49-50, ll. 1-4.)

14. Plaintiff also alleged eight (8) other causes of action against the remaining defendants, but none of the following remaining eight (8) causes of action are asserted against Moving Defendants:

- a. Count I – Fraud (Against all Foreclosing and Lending Defendants);
  - b. Count II – Violation of the Nevada Uniform Fraudulent Transfer Act NRS 112.180; NRS 112.190 et seq. (Against all Lending and Foreclosing Defendants);
  - c. Count VI – Violation of US Statute 15 U.S. 1601; 26 U.S.C. 860(g); 18 U.S.C. 1341; 18 U.S.C. 1342; 18 U.S.C. 1343; 18 U.S.C. 1344
  - d. Count VII – Violation of 42 U.S.C. 1982 and 42 U.S.C. 1983;
  - e. Count VIII - Violation of Due Process Clause of U.S. Constitution, Nevada State Constitution, California State Constitution, Lack of Notice and Takings Clause;
  - f. Count X – Violation of U.S. and Nevada Racketeering Statutes;
  - g. Count XI – Intentional Bad Faith Violations of Federal Debt Collection Practices Act 15 USC 1692; and
  - h. Count XII – Punitive Damages Allegation Pursuant to NRS 42.001 et seq.

### **III. LEGAL ARGUMENT**

## **A. Motion to Dismiss Standard**

20 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may  
21 dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted."  
22 A properly pled complaint must contain a "short and plain statement of the claim showing  
23 that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2); Bell Atlantic Corp v. Twombly,  
24 500 U.S. 544, 555 (2007). A motion to dismiss under Rule 12(b)(6) tests the complaint's  
25 sufficiency. See N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983).  
26 When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim,  
27 dismissal is appropriate only when the complaint does not give the defendant fair notice of a

1 legally cognizable claim and the grounds on which it rests. See Bell Atl. Corp. v. Twombly,  
 2 550 U.S. at 555. While a party is not required to plead detailed factual allegations, Fed. R.  
 3 Civ. P. requires “more than labels and conclusions” or a “formulaic recitation of the elements  
 4 of a cause of action.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Papasan v.  
 5 Allain, 478 U.S. 265, 286 (1986)). In order to prevail on a motion to dismiss, a complaint  
 6 must contain sufficient factual matter to “state a claim to relief that is plausible on its face.”  
 7 Iqbal, 129 S. Ct. at 1949. The court, however, is not required to accept as true allegations that  
 8 are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. See  
 9 Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001); see also In re Stac  
 10 Electronics Securities Litigation, 89 F.3d 1399, 1403 (9th Cir. 1996) (quoting In re Verifone  
 11 Securities Litigation, 11 F.3d 865, 868 (9th Cir. 1993)) (alteration omitted) (“conclusory  
 12 allegations of law and unwarranted inferences are insufficient to defendant a Motion to  
 13 Dismiss for failure to state a claim.”).

14 The United States Supreme Court, in their seminal case of *Ashcroft v. Iqbal*, held:  
 15 To survive a motion to dismiss, a complaint must contain sufficient factual  
 16 matter, accepted as true, to “state a claim for relief that is plausible on its  
 17 face.” A claim has facial plausibility when the plaintiff pleads factual content  
 18 that allows the court to draw a reasonable inference that the defendant is liable  
 19 for the misconduct alleged. The *plausibility standard is not akin to a*  
*“probability requirement,” but it asks for more than a sheer possibility that*  
*the defendant has acted unlawfully. Where a complaint pleads facts that are*  
*“merely consistent with” a defendant’s liability, it “stops short of the line*  
*between possibility and plausibility of entitlement to relief”*.

20 . . .  
 21 Only a Complaint that states a plausible claim for relief survives a motion to  
 22 dismiss. Determining whether a complaint states a plausible claim for relief  
 23 will, as the Court of Appeals observed, be a context-specific task that requires  
 24 the reviewing court to draw on judicial experience and common sense. For  
 where the well-pleaded facts do not permit the court to infer more than the  
 possibility of misconduct, the Complaint has alleged – but it has not  
 “show[n]” – that the pleader is entitled to relief.

25 In keeping with these principles a court considering a motion to dismiss can  
 26 choose to begin by identifying pleadings that, because they are no more than  
 27 conclusions, are not entitled to the assumption of truth. While legal  
 conclusions can provide the framework of a complaint, they must be  
 supported by factual allegations. When there are well-pleaded factual

1 allegations, a court should assume their veracity and then determine whether  
2 they plausibly give rise to an entitlement of relief.

3 556 U.S. 662, 677-79 (2009) (emphasis added).

4 When ruling on Rule 12(b)(6) motions to dismiss, courts must consider  
5 documents incorporated into the complaint by reference and matters of which a court  
6 may take judicial notice. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S.  
7 308, 322, 127 S. Ct. 2499, 2509, 168 L.Ed.2d 179 (2007). A court does not need to  
8 accept as true allegations that contradict matters properly subject to judicial notice.  
9 Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.), opinion amended on  
10 denial of reh'g, 275 F.3d 1187 (9th Cir. 2001).

11 If the court grants a motion to dismiss, it must then decide whether to grant leave to  
12 amend. The court should “freely give” leave to amend when there is no “undue delay, bad  
13 faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party  
14 by virtue of . . . the amendment, [or] futility of the amendment . . . .” FED. R. CIV. P. 15(a);  
15 Foman v. Davis, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it  
16 is clear that the deficiencies of the complaint cannot be cured by amendment. See DeSoto v.  
17 Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992).

18 Plaintiff has failed to set forth any cognizable legal theory supporting claims for  
19 Injunctive Relief for Unjust Enrichment, Breach of Contract, violation of NRS Chapters 645  
20 and 675, and Negligence in the Complaint. Thus, Plaintiff’s causes of action for Injunctive  
21 Relief for Unjust Enrichment, Breach of Contract, violation of NRS Chapters 645 and 675,  
22 and Negligence alleged against the Moving Defendants should be dismissed in their entirety.

23 **B. Plaintiff Has Failed to State any Claim for Relief Against Juliana McNeill**

24 J. McNeill must be dismissed from the action for Plaintiff’s failure to state a claim  
25 under Rule 12(b)(6), as J. McNeill is not a proper party to this litigation. First, a review of  
26 Plaintiff’s Complaint reveals that there is not a single allegation asserted against J. McNeill  
27 that rises to a cognizable claim for any of the twelve (12) claims for relief alleged by

1 Plaintiff. The sole allegation against J. McNeill in the entire Complaint appears on page 6 of  
2 the Complaint, wherein Plaintiff alleges that J. McNeill was “involved in fraudulent property  
3 transactions. (Compl., p. 6, ¶ 22.)

4 J. McNeill’s sole connection to the real estate transaction that is related to Plaintiff’s  
5 Complaint peripherally is J. McNeill’s execution of the Grant, Bargain and Sale Deed from J.  
6 McNeill to M. McNeill, recorded in the Clark County Recorder’s Office as Document No.  
7 201102240003424 on February 24, 2011. See Grant, Bargain and Sale Deed, **Exhibit 1** to  
8 Request for Judicial Notice. J. McNeill is M. McNeill’s wife, and she executed the Grant,  
9 Bargain and Sale Deed for the sole purpose of relinquishing any of her community property  
10 rights or claims as to the Property. J. McNeill had absolutely no involvement in the  
11 transaction with Plaintiff. As a result, J. McNeill should be dismissed as a party from this  
12 litigation in the entirety, as Plaintiff fails to state a claim against J. McNeill upon which relief  
13 can be granted as required under Rule 12(b)(6).

14

15 C. **Plaintiff has alleged Plaintiff Has Failed to State a Valid Claim for Injunctive**  
**Relief for Unjust Enrichment, Because Plaintiff has Failed to Allege**

16 Plaintiff has alleged in its Third Cause of Action a claim for Injunctive Relief for  
17 Unjust Enrichment “against all defendants”. (Compl., p. 37, ll. 11-12.) For the reasons set  
18 forth below, Plaintiff’s Third Cause of Action for Injunctive Relief for Unjust Enrichment  
19 must be dismissed as to the Moving Defendants.

20 1. **Plaintiff Fails to Allege a Cognizable Claim for Which Relief May be**  
**Granted, Warranting Dismissal of the Third Cause of Action.**

22 As a preliminary matter, there is no common law, statutory or any other cause of  
23 action that exists for “Injunctive Relief for Unjust Enrichment.” Second, Plaintiff’s claim  
24 sounding in injunctive relief is moot, as the Moving Defendants S. Joe and M. McNeill sold  
25 the Property nearly six (6) years ago in 2011.<sup>2</sup> As a result, there is no conduct or action for  
26

27 <sup>2</sup> See Grant, Bargain and Sale Deed from S. Joe and M. McNeill to third party buyers, **Exhibit 2** to the Request  
for Judicial Notice.

1 Plaintiff to enjoin at this time as it relates to the Moving Defendants and their prior  
2 ownership interest in the Property, as Moving Defendants S. Joe and M. McNeill no longer  
3 own the Property, and have not owned the Property for approximately six (6) years.

4

5       **2. Plaintiff Fails to State a Claim for Injunctive Relief Against  
Moving Defendants.**

6           In an abundance of caution, Moving Defendants will address the injunctive relief  
7 component of Plaintiff's Third Cause of Action, and demonstrate below that Plaintiff has  
8 failed to state a claim for injunctive relief against Moving Defendants. "Preliminary  
9 injunctions and temporary restraining orders are governed by Rule 65 of the Federal Rules of  
10 Civil Procedure, which provides that a "court may issue a preliminary injunction only on  
11 notice to the adverse party." FED. R. CIV. P. 65(a)(1).

12           "A plaintiff seeking a preliminary injunction must establish that he is likely to  
13 succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
14 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the  
15 public interest." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). Injunctive  
16 relief is "an extraordinary remedy that may only be awarded upon a clear showing that the  
17 plaintiff is entitled to such relief." Id. at 22. "[C]ourts must balance the competing claims of  
18 injury and must consider the effect on each party of the granting or withholding of the  
19 requested relief." Id. at 24 (internal quotation marks omitted).

20           Irreparable harm cannot be "economic injury alone . . . because such injury can be  
21 remedied by a damage award." Rent-A-Center, Inc. v. Canyon Tele. & Appliance Rental,  
22 Inc., 944 F.2d 597, 603 (9th Cir. 1991).

23           In the Complaint, Plaintiff makes not a single showing of irreparable harm, and fails  
24 to allege that Plaintiff will be seriously harmed if Moving Defendants are not enjoined from  
25 any type of conduct or action. Plaintiff has failed to sufficiently establish her claim of  
26 irreparable harm. In the present case, the defect in Plaintiff's Complaint is not that she is too  
27 vague or raises allegations that are speculative in nature; rather, Plaintiff has failed to

1 articulate in any cognizable fashion any of the elements necessary to establish or properly  
 2 allege injunctive relief. Plaintiff fails to allege that any potential injury suffered as a result of  
 3 Moving Defendants' continuing conduct without an injunction cannot be adequately  
 4 remedied by monetary damages. See Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668,  
 5 675 (9th Cir. 1988) (finding that, where multiple contingencies must occur before an injury  
 6 would become a concrete harm, the injury was "too speculative to constitute an irreparable  
 7 harm justifying injunctive relief."). To the contrary, the only remedy available to Plaintiff  
 8 from Moving Defendants is monetary in nature, as none of the Moving Defendants have held  
 9 an ownership interest in the Property for six (6) years.

10 The closest Plaintiff gets to alleging anything that resembles an allegation for  
 11 injunctive relief is the statement that an order should be entered "enjoining and requiring  
 12 Defendants to unwind the sale transaction, [and to] re-deed the Property to the Plaintiff."  
 13 (Compl., p. 37, ¶ 160, ll. 21-25.) Plaintiff falls woefully short of alleging the elements  
 14 necessary for injunctive relief, and as a result, Plaintiff fails to state a claim upon which relief  
 15 may be granted. Plaintiff does not allege she is likely to succeed on the merits, that she is  
 16 likely to suffer irreparable harm in the absence of an injunction, or that the balance of  
 17 equities tips in her favor, and that an injunction is in the public interest. Thus, Plaintiff's  
 18 request for an injunction must fail under Rule 12(b)(6), and the Third Cause of Action for  
 19 Injunctive Relief for Unjust Enrichment should be dismissed by this Court.

20       **3. Plaintiff Fails to State a Claim for Unjust Enrichment, Warranting  
 21 Dismissal of the Third Cause of Action.**

22 To the extent Plaintiff is alleging unjust enrichment as a stand-alone claim under the  
 23 Third Cause of Action, the claim likewise fails as a matter of law and must be dismissed.  
 24 "An action based on a theory of unjust enrichment is not available when there is an express,  
 25 written contract, because no agreement can be implied when there is an express agreement."  
 26 Leasepartners Corp. v. Robert L. Brooks Trust, 942 P.2d 182, 187 (Nev. 1997) (per curiam).  
 27 Thus, the doctrine of unjust enrichment only "applies to situations where there is no legal

1 contract but where the person sought to be charged is in possession of money or property  
 2 which in good conscience and justice he should not retain but should deliver to another [or  
 3 should pay for].” Id. Unjust enrichment occurs whenever a “person has and retains a benefit  
 4 which in equity and good conscience belongs to another.” Nevada Indus. Dev. v. Benedetti,  
 5 741 P.2d 802, 804 n.2 (Nev. 1987). The Nevada Supreme Court has observed that the  
 6 essential elements of unjust enrichment “are a benefit conferred on the defendant by the  
 7 plaintiff, appreciation by the defendant of such benefit, and acceptance and retention by the  
 8 defendant of such benefit.” Unionamerica Mtg. v. McDonald, 626 P.2d 1272, 1273 (Nev.  
 9 1981).

10 Here, Plaintiff’s Complaint fails to allege that if the Court were to find that no valid  
 11 contract existed between Plaintiff and the Moving Defendants, then Plaintiff would still be  
 12 entitled to recover under a theory of unjust enrichment. See generally Compl. Plaintiff’s only  
 13 reference of the phrase “unjust enrichment” is that “[t]ransferring Defendants and  
 14 Foreclosure Defendants have been unjustly enriched by retaining the Property. The principles  
 15 of justice, equity and good conscience require that such property be returned to Plaintiff.”  
 16 (Compl., p. 38, ¶ 163, ll. 4-6.) Plaintiff allegations relating to unjust enrichment are alleged  
 17 against the “Transferring Defendants” and the “Foreclosing Defendants”, and there is no  
 18 reference to any of the Moving Defendants. (Compl., p. 38, ¶ 163, l. 4.) Plaintiff fails to  
 19 allege what Moving Defendants have and over what they have retained a benefit, which in  
 20 equity and good conscience belongs to Plaintiff. Plaintiff simply fails to allege the most basic  
 21 allegations as to Plaintiff, and absent such basic allegations, Plaintiff’s claims for relief for  
 22 unjust enrichment must fail as a matter of law under Rule 12. Accordingly, Plaintiff has  
 23 failed to adequately plead a claim for unjust enrichment against Moving Defendants. Thus,  
 24 this Court should deny Plaintiff’s Third Cause of Action for Unjust Enrichment.

25 For all of the foregoing reasons, Plaintiff has failed to state a valid claim for unjust  
 26 enrichment and it must be dismissed as a matter of law under Rule 12(b)(6).  
 27

1     D. **Plaintiff Has Failed to State a Claim for Breach of Contract Because No Privity**  
 2     **of Contract Exists Between Plaintiff and Moving Defendants**

3                 In the Complaint, Plaintiff alleges in the Fourth Cause of Action breach of contract  
 4     “against all Defendants”. (Compl., p. 38, ll. 10-11.) A plaintiff in a breach of contract action  
 5     must “show (1) the existence of a valid contract, (2) a breach by the defendant, and  
 6     (3) damage as a result of the breach.” Saini v. Int’l Game Tech., 434 F. Supp. 2d 913, 920–21  
 7     (D. Nev. 2006) (citing Richardson v. Jones, 1 Nev. 405, 405 (1865)); see Restatement  
 8     (Second) of Contracts § 203 (2007); Calloway v. City of Reno, 993 P.2d 1259, 1263 (Nev.  
 9     2000) (“A breach of contract may be said to be a material failure of performance of a duty  
 10   arising under or imposed by agreement”). Plaintiff’s allegations for breach of contract, when  
 11   taken as true, are insufficiently pled to identify any of the elements of breach of contract as it  
 12   relates to Moving Defendants.

13                 In the present case, Plaintiff alleges that she entered into a written contract with  
 14   Defendant PCM, and that “Plaintiff was contracting with Lender Pacific Community  
 15   Mortgage Inc., and that the contract is void on its face. (Compl., p. 38, ll. 13-15.) Nowhere  
 16   does Plaintiff allege that Moving Defendant agreed to perform under any contract with  
 17   Plaintiff, nor does Plaintiff allege how Moving Defendants breached a contract. See generally  
 18   Compl. Plaintiff likewise does not assert that she has performed any duties and obligations  
 19   required by any contract with Moving Defendants. See generally Compl. Finally, Plaintiff’s  
 20   Complaint is devoid of a single allegation that states the Moving Defendant’s failure to  
 21   perform under any contract constitutes a breach of a contract. See generally Compl.  
 22   Accordingly, Plaintiff has provided absolutely no allegations to form the basis from which  
 23   the Court could conclude that Moving Defendants plausibly breached an agreement, as  
 24   Plaintiff never alleges anywhere in the Complaint, including the Fourth Cause of Action, that  
 25   a contract ever existed between Plaintiff and Moving Defendants.

1       Because Plaintiff never alleged that she entered into a contract with any of the  
2 Moving Defendants, Plaintiff's claim for breach of contract against Moving Defendants fails  
3 as a matter of law.

4       **E. Plaintiff Has Failed to State a Claim for Violation of NRS Chapters 645 and 675.**

5           In the Fifth Cause of Action, Plaintiff alleges against the "Lending and Foreclosing  
6 Defendants" a violation of Nevada Lending and Foreclosure Statutes under NRS 645 and  
7 NRS 675. (Compl., p. 39, ll. 21-24.) Specifically, Plaintiff relies upon NRS 645F.420,  
8 NRS 645F.430, NRS 645.F440, NRS 645F445, NRS 645F.450 and NRS 675 as the basis for  
9 its Fifth Cause of Action. (Compl., pp. 39-44.) As set forth in greater detail below, Plaintiff's  
10 reliance upon Chapters 645F and 675 are misplaced, insufficiently pled, or the statutes relied  
11 upon by Plaintiff are simply inapplicable, warranting dismissal for failure to state a claim  
12 under Rule 12(b)(6).

13       **1. NRS 654F.420 does Not Apply to Moving Defendants, but Relates Solely  
14 to Violations of "Covered Services" Under NRS 645F.400, and Moving  
Defendants Rendered No "Covered Services".**

15           Plaintiff seeks to enforce Chapter 645F.420 against Moving Defendants. (Compl.,  
16 p. 40, ¶¶ 180-181, p. 41, ll. 1-4.) Chapter 645F of the Nevada Revised Statute governs  
17 mortgage lending and related professions. NRS 645F.420 states that a homeowner may bring  
18 an action to recover damages "as a result of a person's violation of a provision of  
19 NRS 645F.400 ..." The scope of NRS 645F.400 covers exclusively "persons performing  
20 covered services for compensation" and delineates a number of prohibited acts. "Covered  
21 service" is defined under NRS 645F.310 as the following:

- 22           1. Financial counseling to a homeowner, including, without limitation,  
23 debt counseling and budget counseling.  
24           2. Receiving money for the purpose of distributing it to creditors in  
25 payment or partial payment of any obligation secured by a mortgage or other  
lien on a residence in foreclosure.  
26           3. Contacting a creditor on behalf of a homeowner.  
27

1       4. Arranging or attempting to arrange for an extension of the period within  
2 which a homeowner may cure a default and reinstate an obligation pursuant to  
a note, mortgage or deed of trust.

3       5. Arranging or attempting to arrange for any delay or postponement of  
4 the time of a foreclosure sale of a residence in foreclosure.

5       6. Advising a homeowner regarding the filing of any document or  
6 assisting in any manner in the preparation of any document for filing with a  
bankruptcy court.

7       7. Giving any advice, explanation or instruction to a homeowner which in  
8 any manner relates to the cure of a default in or the reinstatement of an  
obligation secured by a mortgage or other lien on a residence, the full  
satisfaction of the obligation, or the postponement or avoidance of a  
foreclosure sale.

9       8. Arranging or conducting, or attempting to arrange or conduct, for a  
10 homeowner any forensic loan audit or review or other audit or review of loan  
documents.

11       9. Arranging or attempting to arrange for a homeowner the purchase by a  
12 third party of the homeowner's mortgage loan.

13       10. Arranging or attempting to arrange for a homeowner a reduction of the  
14 principal of the homeowner's mortgage loan when such a mortgage loan is  
held by or serviced by a third party.

15       11. Providing the services of a loan modification consultant.

16       12. Providing the services of a foreclosure consultant.

17       NEV. REV. STAT. § 645F.420.

18       NRS 645F.420 does not apply to Moving Defendants, as this provision relates solely  
19 to conduct arising from violations of NRS 645F.400, which encompasses only "covered  
20 services" as defined under NRS 645F.310. Plaintiff fails to allege that Moving Defendants  
21 are "covered entities." See generally Compl.

22       **2. Plaintiff's Claims Under NRS 645F.445 and NRS 645F.450 Both Fail as a  
23 Matter of Law, Because Both Statutes are Inapplicable to the Moving  
Defendants.**

24       Plaintiff seeks to enforce NRS 645F.445 and NRS 645F.450 against Moving  
25 Defendants, but neither statute applies in the present case. (Compl., p. 40, ¶¶ 180-181, p. 41,  
26 ll. 1-4.) NRS 645F.445 governs mortgage lending and related professions. Both claims under  
27 NRS 645F.445 and NRS 645F.450 must be dismissed, because Plaintiff fails to state a claim

1 against Moving Defendants upon which relief can be granted, warranting dismissal under  
2 Rule 12(b)(6).

3 NRS 645F.445 provides that:

4 Person with knowledge of violation prohibited from providing assistance or  
5 support to foreclosure consultant, loan modification consultant or person  
6 performing covered services for compensation. A person who knows or  
7 reasonably should know that another person who performs any covered  
8 service for compensation, a foreclosure consultant or a loan modification  
9 consultant is in violation of any provision of NRS 645F.300 to 645F.450,  
inclusive, and any regulations adopted pursuant thereto shall not provide  
substantial assistance or support to the person who performs any covered  
service for compensation, the foreclosure consultant or the loan modification  
consultant.

10 NEV. REV. STAT. § 645F.445.

11 Plaintiff also cites to NRS 645F.450 without any specific allegations against Moving  
12 Defendants, which governs the cumulative nature of penalties and provides that:

13 The rights, remedies and penalties provided pursuant to the provisions of NRS  
14 645F.300 to 645F.450, inclusive, are cumulative and do not abrogate and are  
15 in addition to any other rights, remedies and penalties that may exist at law or  
in equity, including, without limitation, any criminal penalty that may be  
imposed pursuant to NRS 645F.430.

16 NEV. REV. STAT. § 645F.450.

17 In the present case, Plaintiff fails to craft any allegations against Moving Defendants  
18 under NRS 645F.445 and NRS 645F.450. Rather, Plaintiff simply includes a cut and paste  
19 of the statute, which is insufficient to meeting pleading requirements to withstand dismissal  
20 under Rule 12(b)(6). NRS 645F.445 does not apply to Moving Defendants, as they are  
21 simply purchasers at a foreclosure sale and have no involvement with “foreclosure  
22 consultant, loan modification consultant or person performing covered services for  
23 compensation”. Plaintiff fails to allege that any of the Moving Defendants are “covered  
24 services” as defined under NRS 645F.310. See generally Compl. Plaintiff’s claim arising  
25 under NRS 645F.450 also does not apply to Moving Defendants, because the penalty  
26 provision is only triggered as it relates to NRS 645F.300 to NRS 645F.450, and none of those  
27 claims raised by Plaintiff survive against Moving Defendants. Plaintiff’s claims under

1 NRS 645F.445 and NRS 645F.450 must be dismissed as to the Moving Defendants for  
2 failure to state a claim under Rule 12(b)(6).

3       **3. Plaintiff's Claims Under NRS 645F.430 and NRS 645F.440 Both Fail as a  
4 Matter of Law, Because Plaintiff Fails to Allege Fraud with Requisite  
Particularity Under Rule 9.**

5       Plaintiff seeks to enforce NRS 645F.430 and NRS 645F.440 against Moving  
6 Defendants, but the allegations are not pled with sufficient specificity required under Rule 9,  
7 and, therefore, Plaintiff's claims cannot survive a 12(b)(6) motion. (Compl., pp. 41-43, ¶¶  
8 182-183.) NRS 645F.430 governs foreclosure purchasers, and provides that:

9           Criminal penalty for **fraud or deceit** against homeowner. A foreclosure  
10 purchaser who engages in any conduct that operates as a **fraud or deceit** upon  
11 a homeowner in connection with a transaction that is subject to the provisions  
12 of NRS 645F.300 to 645F.450, inclusive, including, without limitation, a  
foreclosure reconveyance, is guilty of a gross misdemeanor and shall be  
punished by imprisonment in the county jail for not more than 364 days, or by  
a fine of not more than \$50,000, or by both fine and imprisonment.

13 NEV. REV. STAT. §645F.430 (emphasis added).

14       NRS 645F.440 provides that the transaction involving foreclosure purchasers may be  
15 rescinded “due to **fraud or deceit** upon homeowner.” NEV. REV. STAT. §645F.440 (emphasis  
16 added). The elements of fraud consist of (1) a false representation (2) in reference to a  
17 material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with  
18 action taken in reliance on the misrepresentation. Hart v. McLucas, 535 F.2d 516, 519 (9th  
19 Cir. 1976) (citing Pence v. United States, 316 U.S. 332, 338, 62 S.Ct. 1080, 1083, 86 L.Ed.  
20 1510 (1942)).

21       NRS 645F.440 contains a number of conditions precedent, which must be met before  
22 a homeowner may avail herself of the rescission remedy, and requires the homeowner to do  
23 the following:

24       2. To rescind a transaction pursuant to subsection 1, the homeowner must  
give written notice to the foreclosure purchaser and a successor in interest to  
the foreclosure purchaser, if the successor in interest is not a bona fide  
purchaser, and record that notice with the recorder of the county in which the  
property is located. The notice of rescission must contain:

27

1                   (a) The name of the homeowner, the foreclosure purchaser and any  
2                   successor in interest who holds title to the property; and

3                   (b) A description of the property.

4                   3. Within 20 days after receiving notice pursuant to subsection 2:

5                   (a) The foreclosure purchaser and the successor in interest, if the successor  
6                   in interest is not a bona fide purchaser, shall reconvey to the homeowner title  
7                   to the property free and clear of encumbrances which were created subsequent  
8                   to the rescinded transaction and which are due to the actions of the foreclosure  
9                   purchaser; and

10                  (b) The homeowner shall return to the foreclosure purchaser any  
11                  consideration received from the foreclosure purchaser in exchange for the  
12                  property.

13                  NEV. REV. STAT. §645F.440(2).

14                  Subsection 5 provides that “[a] transaction may not be rescinded pursuant to this  
15                  section if the foreclosure purchaser has transferred the property to a bona fide purchaser.”

16                  NEV. REV. STAT. §645F.440(5). A “bona fide purchaser” is defined under this section as “any  
17                  person who purchases an interest in a residence in foreclosure from a foreclosure purchaser  
18                  in good faith and for valuable consideration and who does not know or have reasonable cause  
19                  to believe that the foreclosure purchaser engaged in conduct which violates subsection 1.”

20                  NEV. REV. STAT. §645F.440(5).

21                  There is no need to address whether or not this transaction is subject to the provisions  
22                  of NRS 645F.300 to 645F.450, as this Court may dispose of Plaintiff’s claim under  
23                  NRS 645F.430 and NRS 645F.440 on the basis that Plaintiff failed to meet the pleading  
24                  requirements to survive a motion to dismiss arising from a fraud claim. NRS 645F.430  
25                  contains a fraud component, in that it requires “fraud or deceit” against Plaintiff, the former  
26                  homeowner of the Property.

27                  Rule 9(b) of the Federal Rules of Civil Procedure provides that “[i]n alleging fraud ...  
28                  a party must state with particularity the circumstances constituting fraud...” FED. R. CIV. P.  
29                  9(b). “Rule 9(b) serves not only to give notice to defendants of the specific fraudulent  
30                  conduct against which they must defend, but also to deter the filing of complaints as a pretext

1 for the discovery of unknown wrongs, to protect defendants from the harm that comes from  
 2 being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the  
 3 court, the parties and society enormous social and economic costs absent some factual basis.”  
 4 Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1057 (9th Cir. 2011) (citing Bly-  
 5 Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001)).

6 Fraud is an express element of NRS, and, therefore, Plaintiff must meet the  
 7 heightened pleading requirements of Rule 9(b). Plaintiff’s only allegation against the Moving  
 8 Defendants under the Fifth Cause of Action is that “Defendant McNeill and Joe are not and  
 9 were not bonafide [sic] purchasers for value. A mere investigation of title would dispose  
 10 anyone of any legality of this purchase and any purchaser should have reasonable cause to  
 11 investigate the Non-Judicial Trustee’s Sale.” (Compl., p. 43, ¶ 184, ll. 12-15.) Plaintiff’s sole  
 12 allegation in paragraph 43 of the Complaint is woefully short of meeting the heightened  
 13 pleading requirement under Rule 9, in that it contains not a single piece of information that  
 14 conveys any specificity as to time, manner, place or persons involved in the alleged fraud, or  
 15 what the purported fraud even is, for that matter. See generally Compl. Plaintiff’s claims  
 16 arising under NRS 645F.430 and NRS 645F.440 must be dismissed for failure to meet the  
 17 heightened pleading requirement under Rule 9. Dismissal is therefore appropriate under Rule  
 18 12(b)(6) for failure to state a claim as to Moving Defendants.

19       **4. Plaintiff’s Claim Under Chapter 675 Fails as a Matter of Law Because  
 20 Plaintiff Makes Not a Single Allegation in Support of this Claim, and  
 Chapter 675 Governs Installment Loans, and Is Inapplicable.**

21       In the heading of the Complaint, Plaintiff includes as part of her Fifth Cause of  
 22 Action for alleged violation of Nevada lending and foreclosure statements a claim under  
 23 Chapter 675 of the Nevada Revised Statutes. (Compl., p. 39, ll. 22-24.) First, Plaintiff fails to  
 24 make a single allegation in the Complaint against Moving Defendants arising under Chapter  
 25 675. See Compl. Plaintiff likewise fails to identify which specific section under Chapter 675  
 26 Plaintiff seeks to allege against Moving Defendants. See Compl.

27

1       Second, Chapter 675 of the Nevada Revised Statute governs “Installment Loans” and  
2 applies as follows:

3       NRS 675.035 Applicability of chapter. The provisions of this chapter  
4 apply to any person who:

5           1. Makes installment loans that are not subject to regulation pursuant to  
6 chapter 604A of NRS;

7           2. Is an affiliate, subsidiary or holding company of a bank, national  
8 banking association, savings bank, trust company, savings and loan  
9 association, credit union, mortgage broker, mortgage banker, thrift company  
or insurance company; and

10          3. Seeks to evade its application by any device, subterfuge or pretense,  
11 including, without limitation:

12              (a) Calling a loan by any other name;

13              (b) Using any agents, affiliates or subsidiaries in an attempt to avoid the  
14 application of the provisions of this chapter; or

15              (c) Having any affiliation or other business arrangement with an entity that  
16 is exempt from the provisions of this chapter pursuant to subsection 1 of NRS  
17 675.040, the effect of which is to evade the provisions of this chapter,  
18 including, without limitation, making a loan while purporting to be the agent  
19 of such an exempt entity where the purported agent holds, acquires or  
20 maintains a material economic interest in the revenues generated by the loan.

21       NEV. REV. STAT. § 675.035.

22       Plaintiff fails to allege anywhere in the Complaint that any of the Moving Defendants  
23 were ever involved in the making of installment loans to Plaintiff. See Compl. As a result,  
24 Chapter 675 is wholly inapplicable to Moving Defendants. Plaintiff’s claim arising under  
25 Chapter 675 must be dismissed under Rule 12(b)(6), because Plaintiff fails to state a claim  
26 against Moving Defendants upon which relief can be granted.

27 **F. Plaintiff Has Failed to State a Claim for Negligence Because Plaintiff Cannot**  
**Recover for Negligence Absent the Existence of a Contract.**

28       Plaintiff’s Ninth Cause of Action for Negligence must fail as a matter of law under  
29 Rule 12(b)(6) because it is a well-established common law rule that “absent privity of  
30 contract or an injury to person or property, a plaintiff may not recover in negligence for  
31 economic loss.” See Local Joint Executive Bd. Of Las Vegas, Culinary Workers Union,

1    Local No. 226 v. Stern, 98 Nev. 409, 410-11 (1982). In the Complaint, Plaintiff fails to allege  
2    anywhere that Plaintiff and the Moving Defendants are in privity of contract. See Compl.  
3    There are no facts that were properly pled by Plaintiff against Moving Defendants that may  
4    permit recovery for negligence. Therefore, the negligence claims should be dismissed as a  
5    matter of law for failure to state a claim under Rule 12(b)(6).

6                  **IV.    CONCLUSION**

7       Plaintiff's claims for Injunctive Relief for Unjust Enrichment, Breach of Contract,  
8    violations of NRS 645F and 675, and Negligence fail as a matter of law for failure to state a  
9    claim under Rule 9(b) and Rule 12(b)(6). For all of the foregoing reasons, Moving  
10   Defendants respectfully request that this Court dismiss Plaintiff's claims for Injunctive Relief  
11   for Unjust Enrichment, Breach of Contract, violations of NRS 645F and 675, and  
12   Negligence.

13                  DATED this 10th day of June, 2016.

14                  **HOLLEY DRIGGS WALCH FINE  
WRAY PUZEY & THOMPSON**

15                  /s/ Ogonna M. Brown  
16                  OGONNA M. BROWN, ESQ. (NBN 7589)  
17                  E-mail: obrown@nevadafirm.com  
18                  400 South Fourth Street, Third Floor  
19                  Las Vegas, Nevada 89101  
20                  Telephone: 702/791-0308  
21                  *Attorneys for Defendants Steven Joe,  
Michael McNeill and Juliana McNeill*

22                  11682-01/1701472

23

24

25

26

27

1                   CERTIFICATE OF SERVICE

2                 I certify that I am an employee of Holley Driggs Walch Fine Wray Puzey &  
3                 Thompson, and that, pursuant to Fed. R. Civ. P. 5(b), on the 10th day of June, 2016, I caused  
4                 the document entitled **DEFENDANTS STEVEN JOE, MICHAEL MCNEILL, AND**  
5                 **JULIANA MCNEILL'S MOTION TO DISMISS** to be served as follows:

- 6                    Personal Service  
7                    Electronic service via CM/ECF  
8                    Fax Service  
9                    Mail Service  
10                   Overnight Delivery

11                 to the following as addressed below:

12                 Todd W Prall  
13                 Hutchison & Steffen, LLC  
14                 E-mail: tprall@hutchlegal.com  
15                 *Attorneys for Christopher J Flaharty; Nichole R Flaharty; Flaharty Family Trust*

16                 Aaron D. Lovaas  
17                 Lovaas & Lehtinen, P.C.  
18                 E-mail aaron@globalbusinesslawyersusa.com  
19                 *Attorneys for Noble Title*

20                 Darren J Welsh  
21                 E-mail: darrenw@americanagrp.com  
22                 *Attorney for Prudential Americana Group*

23                 and served as follows:

- 24                    Personal Service  
25                    Electronic service via CM/ECF  
26                    Fax Service  
27                    Mail Service  
28                    Overnight Delivery

29                 to the following as addressed below:

30                 Salma Agha-Kahn MD.  
31                 3751 Motor Ave #34272  
32                 Los Angeles, CA 90034  
33                 *Plaintiff PRO SE*



34                 An employee of Holley Driggs Walch Fine  
35                 Wray Puzey & Thompson